

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ELIJAH STANFORD,	)	
	)	No. CV-10-35-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

---

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on February 4, 2011 (Ct. Rec. 14, 17). Attorney David L. Lybbert represents plaintiff; Special Assistant United States Attorney Jordan D. Goddard represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 8). On December 3, 2010, plaintiff filed a reply (Ct. Rec. 19). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment (Ct. Rec. 17) and **DENIES** plaintiff's motion for summary judgment (Ct. Rec. 14).

**JURISDICTION**

Plaintiff protectively applied for disability insurance benefits (DIB) and for supplemental security income (SSI) on October 26, 2006, alleging disability beginning April 16, 2001

1 (Tr. 56-59, 321-324). The applications were denied initially and  
2 on reconsideration (Tr. 326-329, 332-333).

3 At a hearing before Administrative Law Judge (ALJ) Robert  
4 Chester on July 23, 2009, plaintiff, represented by counsel, an  
5 orthopedic surgeon, and a vocational expert (VE) testified (Tr.  
6 351-405). On August 14, 2009, the ALJ issued an unfavorable  
7 decision (Tr. 17-26). The Appeals Council denied Mr. Stanford's  
8 request for review on January 22, 2010 (Tr. 6-8). Therefore, the  
9 ALJ's decision became the final decision of the Commissioner,  
10 which is appealable to the district court pursuant to 42 U.S.C. §  
11 405(g). Plaintiff filed this action for judicial review pursuant  
12 to 42 U.S.C. § 405(g) on February 16, 2010 (Ct. Rec. 1,4).

#### 13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing  
15 transcript, the ALJ's decision, the briefs of both plaintiff and  
16 the Commissioner, and are briefly summarized here.

17 Plaintiff was 39 years old at onset in 2001 and 47 on the  
18 date of the ALJ's decision (Tr. 103). He earned a GED (Tr. 378).  
19 Mr. Stanford has worked as a lawn care laborer, commercial  
20 fisherman, tire salesman, and auto mechanic (Tr. 74, 81). His  
21 longest job (after military service) was a year and a half as a  
22 tire salesperson in the automotive department at K-Mart (Tr. 237,  
23 382-383). He was incarcerated from 1998 to March 2004 for child  
24 molestation (Tr. 237).

25 Plaintiff alleges disability due to herniated discs in his  
26 neck (Tr. 72). In July 2006 plaintiff indicated he was in school  
27 (Tr. 274). In December 2006 his reported activities include  
28 spending time on the computer, reading, driving, cooking daily,

1 shopping two to four times a week, doing laundry, and cleaning. He  
2 was able to walk a mile (Tr. 91-96). At the hearing in July 2009  
3 plaintiff testified he can sit less than an hour, carry 20-40  
4 pounds a short distance, has problems with repetitive arm  
5 movements, holding a pen, and drops things like dishes if he does  
6 not complete the task quickly. He has earned good grades in online  
7 college courses (Tr. 386, 392-394, 398). Plaintiff takes pain  
8 medication three times a month (Tr. 355-356). Symptoms leave him  
9 unable to function for a week to ten days, and this occurs two to  
10 three times a month (Tr. 390-391).

#### 11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act (the Act) defines disability as the  
13 "inability to engage in any substantial gainful activity by reason  
14 of any medically determinable physical or mental impairment which  
15 can be expected to result in death or which has lasted or can be  
16 expected to last for a continuous period of not less than twelve  
17 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
18 provides that a Plaintiff shall be determined to be under a  
19 disability only if any impairments are of such severity that a  
20 plaintiff is not only unable to do previous work but cannot,  
21 considering plaintiff's age, education and work experiences,  
22 engage in any other substantial gainful work which exists in the  
23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
24 Thus, the definition of disability consists of both medical and  
25 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
26 (9<sup>th</sup> Cir. 2001).

27 The Commissioner has established a five-step sequential  
28 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
2 is engaged in substantial gainful activities. If so, benefits are  
3 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
4 the decision maker proceeds to step two, which determines whether  
5 plaintiff has a medically severe impairment or combination of  
6 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination  
8 of impairments, the disability claim is denied. If the impairment  
9 is severe, the evaluation proceeds to the third step, which  
10 compares plaintiff's impairment with a number of listed  
11 impairments acknowledged by the Commissioner to be so severe as to  
12 preclude substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,  
14 App. 1. If the impairment meets or equals one of the listed  
15 impairments, plaintiff is conclusively presumed to be disabled.  
16 If the impairment is not one conclusively presumed to be  
17 disabling, the evaluation proceeds to the fourth step, which  
18 determines whether the impairment prevents plaintiff from  
19 performing work which was performed in the past. If a plaintiff is  
20 able to perform previous work, that Plaintiff is deemed not  
21 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
22 this step, plaintiff's residual functional capacity (RFC)  
23 assessment is considered. If plaintiff cannot perform this work,  
24 the fifth and final step in the process determines whether  
25 plaintiff is able to perform other work in the national economy in  
26 view of plaintiff's residual functional capacity, age, education  
27 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
28 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish  
2 a *prima facie* case of entitlement to disability benefits.  
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
4 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
5 met once plaintiff establishes that a physical or mental  
6 impairment prevents the performance of previous work. *Hoffman v.*  
7 *Heckler*, 785 F.3d 1423, 1425 (9<sup>th</sup> Cir. 1986). The burden then  
8 shifts, at step five, to the Commissioner to show that (1)  
9 plaintiff can perform other substantial gainful activity and (2) a  
10 "significant number of jobs exist in the national economy" which  
11 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
12 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

#### 13 STANDARD OF REVIEW

14 Congress has provided a limited scope of judicial review of a  
15 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
16 the Commissioner's decision, made through an ALJ, when the  
17 determination is not based on legal error and is supported by  
18 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
19 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9<sup>th</sup> Cir. 1999). "The  
20 [Commissioner's] determination that a plaintiff is not disabled  
21 will be upheld if the findings of fact are supported by  
22 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
23 Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is  
24 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
25 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
26 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
27 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
28 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such

1 evidence as a reasonable mind might accept as adequate to support  
2 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
3 (citations omitted). "[S]uch inferences and conclusions as the  
4 [Commissioner] may reasonably draw from the evidence" will also be  
5 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
6 review, the Court considers the record as a whole, not just the  
7 evidence supporting the decision of the Commissioner. *Weetman v.*  
8 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v.*  
9 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

10 It is the role of the trier of fact, not this Court, to  
11 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
12 evidence supports more than one rational interpretation, the Court  
13 may not substitute its judgment for that of the Commissioner.  
14 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
15 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
16 evidence will still be set aside if the proper legal standards  
17 were not applied in weighing the evidence and making the decision.  
18 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
19 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
20 support the administrative findings, or if there is conflicting  
21 evidence that will support a finding of either disability or  
22 nondisability, the finding of the Commissioner is conclusive.  
23 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 24 ALJ'S FINDINGS

25 The ALJ found plaintiff was insured through December 31, 2003  
26 for DIB purposes (Tr. 17, 19). At step one he found plaintiff has  
27 not engaged in substantial gainful activity since onset (Tr. 19).  
28 At steps two and three, the ALJ found plaintiff suffers from the

1 medically determinable impairments of degenerative disc disease of  
2 the cervical spine (DDD), ulnar neuropathy of the left upper  
3 extremity, and obesity, impairments that are severe but do not  
4 alone or in combination meet or equal a Listed impairment (Tr. 19-  
5 20). The ALJ found plaintiff less than fully credible (Tr. 22-24).  
6 At step four, ALJ Chester found plaintiff is able to perform his  
7 past relevant work as an automobile accessories salesperson (Tr.  
8 25). Accordingly, at step four the ALJ found Mr. Stanford is not  
9 disabled as defined by the Social Security Act (Tr. 25-26).

#### 10 ISSUES

11 Plaintiff contends the Commissioner erred when he assessed  
12 the medical evidence and Mr. Stanford's credibility, and when he  
13 relied on the VE's testimony (Ct. Rec. 15 at 8-19).

14 Asserting the ALJ's decision is supported by substantial  
15 evidence and free of legal error, the Commissioner asks the Court  
16 to affirm (Ct. Rec. 18 at 19).

#### 17 DISCUSSION

##### 18 A. Weighing medical evidence

19 In social security proceedings, the claimant must prove the  
20 existence of a physical or mental impairment by providing medical  
21 evidence consisting of signs, symptoms, and laboratory findings;  
22 the claimant's own statement of symptoms alone will not suffice.  
23 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
24 on the basis of a medically determinable impairment which can be  
25 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
26 medical evidence of an underlying impairment has been shown,  
27 medical findings are not required to support the alleged severity  
28 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.

1 1991).

2 A treating physician's opinion is given special weight  
3 because of familiarity with the claimant and the claimant's  
4 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
5 1989). However, the treating physician's opinion is not  
6 "necessarily conclusive as to either a physical condition or the  
7 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
8 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
9 treating physician than an examining physician. *Lester v. Chater*,  
10 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
11 given to the opinions of treating and examining physicians than to  
12 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
13 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
14 are not contradicted, they can be rejected only with clear and  
15 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
16 ALJ may reject an opinion if he states specific, legitimate  
17 reasons that are supported by substantial evidence. See *Flaten v.*  
18 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir.  
19 1995).

20 In addition to the testimony of a nonexamining medical  
21 advisor, the ALJ must have other evidence to support a decision to  
22 reject the opinion of a treating physician, such as laboratory  
23 test results, contrary reports from examining physicians, and  
24 testimony from the claimant that was inconsistent with the  
25 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
26 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
27 Cir. 1995).

28 Plaintiff alleges the ALJ failed to properly credit the

1 opinions of Drs. David Woolever, M.D., and Galen McQuarrie, M.D.,  
2 and of treatment provider Serena Williams, ARNP (Ct. Rec. 15 at  
3 16-18). The Commissioner answers the ALJ properly rejected Dr.  
4 Woolever's opinion plaintiff is limited to sedentary work because  
5 it is inconsistent with his own examination results, Dr.  
6 McQuarrie's opinion because he did not examine plaintiff, and Ms.  
7 Williams's opinion because she is not an acceptable source and her  
8 assessment appears based primarily on plaintiff's discounted  
9 subjective complaints (Ct. Rec. 18 at 11-14).

10 The Commissioner asserts the ALJ relied on the opinion of the  
11 testifying expert, Arthur Lorber, M.D., and other evidence, when  
12 he assessed Mr. Sanford's RFC (Ct. Rec. 18 at 15-18).

### 13 **B. Medical history**

14 In 2001 plaintiff attended seven physical therapy  
15 appointments at Airway Heights Physical Therapy. His last visit  
16 was June 4, 2001 (Tr. 131).

17 On July 26, 2001, [about three months after onset in April  
18 2001], Jeffrey Hirschauer, M.D., examined plaintiff (Tr. 128-130).  
19 He reviewed an April 16, 2001 MRI and diagnosed right C5-6 and C6-  
20 7 disc herniation (Tr. 130; 206-207). Dr. Hirschauer opined it  
21 would be reasonable for plaintiff "to undergo anterior cervical  
22 fusion," but Mr. Sanford wanted a second opinion (Tr. 130).

23 After plaintiff's physical therapy appointment on June 4,  
24 2001, he failed to return. Mr. Stanford was discharged October 21,  
25 2002<sup>1</sup> (Tr. 131).

---

26  
27 <sup>1</sup>

28 Similarly the record shows plaintiff attended physical therapy  
in early 2000 and was discharged after four visits for failing

1 On May 29, 2005, VA physician Dr. McQuarrie stated he is  
2 unable to determine plaintiff's exertional limitations because he  
3 has treated Mr. Stanford for reflux disease, not cervical disc  
4 problems (Tr. 222-224). Nonetheless, Dr. McQuarrie signed a one  
5 year renewal of a work restriction (previously authored by the  
6 Department of Corrections) that limited plaintiff to lifting no  
7 more than ten pounds and to "no repetitive motions with his upper  
8 extremities" (Tr. 250).

9 Dr. Woolever first saw plaintiff on January 19, 2006. He  
10 opined Mr. Sanford could perform sedentary work and would benefit  
11 from a neurosurgical consultation (Tr. 219). Dr. Woolever stated  
12 he would not continue to follow Mr. Sanford (Tr. 229-230).

13 Plaintiff initially saw Ms. Williams for treatment on July 28  
14 and August 3 of 2006 (Tr. 268-269, 274-275). At the second  
15 appointment on August 3<sup>rd</sup>, she opined plaintiff is limited to  
16 sedentary work. Twice in this evaluation she noted plaintiff needs  
17 nerve conduction studies, a neurosurgical consultation, and a  
18 repeat MRI (Tr. 272-273). Mr. Stanford returned a year later, in  
19 June 2007, with complaints of right foot pain (Tr. 284, 286-287;  
20 Ex. 11F/1,6,8, 16F/5). Mr. Sanford did not seek treatment with Ms.  
21 Williams for cervical problems until September 2008 (Tr. 303).

22 In March 2009, neurologist Dr. Joseph Tornabene, M.D., notes  
23 plaintiff's EMG study showed "very mild early denervation  
24 abnormalities" (Tr. 310). He suggested conservative treatment due  
25 to the lack of significant denervation, and because clinical signs  
26 showed improvement after traction and physical therapy (Tr. 307-

27 \_\_\_\_\_  
28 to return (Tr. 133). In 1999 he was discharged after three  
visits (Tr. 138).

1 308, 313, Exhibit 19F/2,4).

2 **C. Credibility**

3 To further aid in weighing the conflicting medical evidence,  
4 the ALJ evaluated plaintiff's credibility and found him less than  
5 fully credible (Tr. 22). Credibility determinations bear on  
6 evaluations of medical evidence when an ALJ is presented with  
7 conflicting medical opinions or inconsistency between a claimant's  
8 subjective complaints and diagnosed condition. See *Webb v.*  
9 *Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

10 It is the province of the ALJ to make credibility  
11 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
12 1995). However, the ALJ's findings must be supported by specific  
13 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
14 1990). Once the claimant produces medical evidence of an  
15 underlying medical impairment, the ALJ may not discredit testimony  
16 as to the severity of an impairment because it is unsupported by  
17 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
18 1998). Absent affirmative evidence of malingering, the ALJ's  
19 reasons for rejecting the claimant's testimony must be "clear and  
20 convincing." *Lester*, 81 F.3d at 834. "General findings are  
21 insufficient: rather the ALJ must identify what testimony not  
22 credible and what evidence undermines the claimant's complaints."  
23 *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup>  
24 Cir. 1993).

25 The ALJ found plaintiff less than fully credible because  
26 treatment has been conservative, daily activities are inconsistent  
27 with the level of limitation claimed, and complaints are not  
28 supported by clinical findings (Tr. 22-25).

1        *Conservative treatment.* The ALJ notes Dr. Hirschauer opined  
2 in July 2001 [four months after onset] that anterior cervical  
3 fusion was reasonable, but plaintiff declined and wanted a second  
4 opinion (Tr. 22, referring to 130). As the ALJ observes, it does  
5 not appear plaintiff sought a second opinion. Surgery was  
6 recommended again in August 2002 but, as the ALJ points out, Mr.  
7 Sanford chose to continue conservative therapy (Tr. 22; Ex.  
8 6F/25). Plaintiff has stated he "is reluctant to have surgery as  
9 long as he is able to keep his symptoms under control" (Tr. 24,  
10 301). The ALJ notes Mr. Sanford "has not yet obtained surgery for  
11 his conditions, which suggests that he has been able to keep his  
12 symptoms under control with conservative treatment" (Tr. 24).  
13 Evidence of "conservative treatment" is sufficient to discount a  
14 claimant's testimony regarding severity of an impairment. *Parra v.*  
15 *Astrue*, 481 F.3d 742, 750-751 (9<sup>th</sup> Cir. 2007), citing *Johnson v.*  
16 *Shalala*, 60 F.3d 1428, 1434 (9<sup>th</sup> Cir. 1995).

17        *Daily activities.* Plaintiff's activities are not as limited  
18 as one would expect given his claimed limitations. The ALJ  
19 observes plaintiff spends significant time daily on the computer,  
20 drives, shops, cooks daily, does laundry, and cleans (Tr. 24, 91-  
21 96). An ALJ may properly reject a claimant's symptom testimony if  
22 the claimant is able to spend a substantial part of the day  
23 performing household chores or other activities that are  
24 transferable to a work setting. *Smolen v. Chater*, 80 F.3d 1273,  
25 1284 n.7 (9<sup>th</sup> Cir. 1996), citing *Fair v. Bowen*, 885 F.2d at 603.

26        *Lack of objective medical findings.* The ALJ observes the  
27 medical evidence does not support the disabling level of  
28 limitation alleged (Tr. 22-23). As noted, Dr. Tornabene opined

1 plaintiff's March 2009 EMG<sup>2</sup> showed only very mild early  
2 denervation abnormalities but was otherwise normal, and  
3 recommended conservative treatment, as the ALJ points out (Tr. 24,  
4 310). A nerve conduction study in February 2009 revealed left  
5 ulnar compression neuropathy and *no evidence* of peripheral  
6 neuropathy affecting the bilateral upper extremities, as the ALJ  
7 notes (Tr. 24, 307, 316). A lack of supporting objective medical  
8 evidence is a factor which may be considered in evaluating an  
9 individual's credibility, provided that it is not the sole factor.  
10 *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9<sup>th</sup> Cir. 1991).

11 The ALJ correctly relied on several factors, including  
12 conservative and infrequent treatment for allegedly disabling  
13 pain, activities inconsistent with alleged degree of impairment,  
14 and the lack of clinical support for alleged disabling limitations  
15 when he found Mr. Sanford less than completely credible (Tr. 22-  
16 24).

17 The ALJ's reasons for finding plaintiff less than fully  
18 credible are clear, convincing, and fully supported by the record.  
19 *See Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002)  
20 (proper factors include inconsistencies in plaintiff's statements,  
21 inconsistencies between statements and conduct, and extent of  
22 daily activities). Noncompliance with medical care or unexplained  
23 or inadequately explained reasons for failing to seek medical  
24 treatment also cast doubt on a claimant's subjective complaints.  
25 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603

---

26  
27 <sup>2</sup>The ALJ also reviewed "MRIs from 2001 through 2009,"  
28 contrary to plaintiff's assertion (Tr. 20). The September 2008  
MRI did not differ significantly from the previous study  
(Tr. 304).

1 (9<sup>th</sup> Cir. 1989).

2 **D. ALJ's assessment of medical opinions**

3 The ALJ rejected Dr. McQuarrie's May 2005 opinion that  
4 plaintiff was limited to lifting ten pounds or less and needed  
5 to avoid repetitive arm motions, because the doctor apparently  
6 gave this opinion without examining plaintiff (Tr. 23, referring  
7 to Tr. 222-224). At the same time, Dr. McQuarrie indicated he has  
8 only treated plaintiff in the past for GERD, not alleged cervical  
9 disc problems. He has "no CTs or MRIs" to review, and is unable to  
10 determine plaintiff's exertion level or limitations (Tr. 222-223).  
11 Dr. McQuarrie's opinion is not based on examination and is  
12 equivocal at best. When confronted with conflicting medical  
13 opinions, an ALJ need not accept a treating physician's opinion  
14 that is conclusory and brief and unsupported by clinical findings.  
15 *Tonapetyan v. Halter*, 242 F.3d at 1144, 1149 (9<sup>th</sup> Cir. 2001),  
16 citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992).

17 The ALJ rejected Dr. Woolever's January 2006 opinion (Tr.  
18 218-219, 228-230) because it is internally inconsistent (Tr. 23).  
19 Dr. Woolever's objective findings include normal neck ROM, no  
20 crepitus with movement, and no abnormality in gait or station. Dr.  
21 Woolever assessed no myelopathy or radiculitis. The only  
22 limitation noted is a decreased ability to place his right hand on  
23 his left shoulder. Yet, as the ALJ observes, Dr. Woolever assessed  
24 cervical disc disease and shoulder pain as moderately severe, and  
25 opined plaintiff is limited to sedentary work (Tr. 23, referring  
26 to Ex. 7F/3, 9F/2-3; Tr. 218-219, 229). An opinion that is  
27 internally inconsistent is ambiguous. The ALJ is responsible for  
28 resolving ambiguity. See *Morgan v. Comm'r of Social Sec. Admin.*,

1 169 F.3d 595, 603 (9<sup>th</sup> Cir. 1999). The ALJ was not required to  
 2 credit Dr. Woolever's internally inconsistent opinion.

3 The ALJ rejected Ms. Williams's opinions because she is not  
 4 an "accepted" source as defined by the Act, and because her RFC  
 5 for sedentary work appears based on plaintiff's unreliable self-  
 6 report (Tr. 23). Both are specific, legitimate reasons to reject  
 7 her opinion. *See Andrews v. Shahala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir.  
 8 1995)(ALJ can legitimately accord less weight to a medical opinion  
 9 "premised to a large extent upon the claimant's own accounts of  
 10 his symptoms and limitations" once those complaints have  
 11 themselves been properly discounted).

12 Dr. Lorber testified tests show evidence of DDD in the  
 13 cervical spine, but the record does not contain significant  
 14 objective clinical evidence of focal neurologic deficit (Tr. 358,  
 15 360-361, 374). He opined plaintiff's impairments do not meet or  
 16 medically equal a Listed impairment<sup>3</sup> (Tr. 358-359). Studies show  
 17 left-sided ulnar neuropathy at the elbow. Plaintiff is right  
 18 handed. There is no evidence of persistent motor disorganization  
 19 involving the left hand. Plaintiff uses it on the computer 6-8  
 20 hours a day for school<sup>4</sup> (Tr. 358). Ulnar neuropathy is repaired

---

22 <sup>3</sup>Contrary to plaintiff's argument, he fails to meet his  
 23 burden of setting forth evidence that would support the  
 24 diagnosis and finding of a listed impairment. *Burch v. Barnhart*,  
 400 F.3d 676, 683 (9<sup>th</sup> Cir. 2005); *Swenson v. Sullivan*, 876 F.2d  
 683, 687 (9<sup>th</sup> Cir. 1989).

25 <sup>4</sup>  
 26 ~~Evidence~~ Evidence of plaintiff's time on the computer is inconsistent. He  
 27 spends 6-8 hours a day on the computer (Tr. 356). He has taken  
 28 classes online for two and a half years, takes 15 credits at a  
 time, earns good grades, and is working toward a degree in web  
 design and graphic manipulation (Tr. 356-357). At the hearing  
 plaintiff stated he was currently retaking history, economics,

1 with minor surgery. Plaintiff's doctors have not yet sent him for  
2 a surgical consultation, leading Dr. Lorber to conclude the  
3 condition is not yet severe (Tr. 374).

4 The ALJ credited the ME's opinion. Although the contrary  
5 opinion of a non-examining medical expert does not alone  
6 constitute a specific, legitimate reason for rejecting a treating  
7 or examining physician's opinion, it may constitute substantial  
8 evidence when it is consistent with other independent evidence in  
9 the record. *Tonepetyan*, 242 F.3d at 1149 (internal citation  
10 omitted). While another ALJ may have reached a different  
11 conclusion, this ALJ's conclusion is supported by substantial  
12 evidence. Where evidence is susceptible to more than one  
13 interpretation, the ALJ's conclusion must be upheld. *Burch v.*  
14 *Barnhart*, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005).

15 The ALJ properly weighed the medical evidence and Mr.  
16 Stanford's credibility.

#### 17 **B. Listings**

18 Plaintiff asserts the ALJ erred at step three when he found  
19 none of Mr. Sanford's impairments met or medically equaled a  
20 Listed impairment (Ct. Rec. 15 at 9-11). According to the  
21 Commissioner, plaintiff incorrectly asserts he only needs to show  
22 he met one of the requirements of Listing § 1.04 (Ct. Rec. 18 at  
23 15-17). The Commissioner is correct.

24 The ALJ is responsible for reviewing the evidence and  
25 resolving conflicts or ambiguities in testimony. *Magallanes v.*

26 \_\_\_\_\_  
27 and physical well being (Tr. 378-379). He is on the computer six  
28 hours in a week (Tr. 394). Plaintiff reported his daily  
activities consisted of running errands, taking a nap, and being  
on the computer (Tr. 91).

1 Bowen, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
2 trier of fact, not this court, to resolve conflicts in evidence.  
3 *Richardson*, 402 U.S. at 400. The court has a limited role in  
4 determining whether the ALJ's decision is supported by substantial  
5 evidence and may not substitute its own judgment for that of the  
6 ALJ, even if it might justifiably have reached a different result  
7 upon de novo review. 42 U.S.C. § 405 (g).

8 The ALJ's step three and RFC determinations are fully  
9 supported by the record and free of legal error.

#### 10 **C. VE's testimony**

11 In finding that Mr. Stanford's impairments do not prevent him  
12 from performing his past relevant work, the ALJ relied on the VE's  
13 testimony that Stanford could perform his past relevant work as an  
14 automotive sales person, as it is generally performed (Tr. 25,  
15 401-402). This is correct.

16 Social Security Ruling (SSR) 82-61 sets out three tests to  
17 determine whether a claimant retains the capacity to perform his  
18 or her past relevant work. The job requirements are examined (1)  
19 based on a broad generic classification of the job, (2) as the  
20 claimant actually performed it, or (3) as the job is ordinarily  
21 required [to be performed] by employers throughout the national  
22 economy. The ALJ's finding that plaintiff is able to perform the  
23 work as it is generally performed (Tr. 25) is supported by  
24 substantial evidence. See e.g., *Listasio v. Shalala*, 47 F.3d 348,  
25 350 (9<sup>th</sup> Cir. 1995) ("vocational experts can testify whether  
26 particular applicants for disability benefits would be able to  
27 perform subcategories of jobs within the DOT").

28 The Court finds the ALJ's assessment of the evidence is

1 supported by the record and free of legal error.

2 **CONCLUSION**

3 Having reviewed the record and the ALJ's conclusions, this  
4 court finds that the ALJ's decision is free of legal error and  
5 supported by substantial evidence..

6 **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is  
8 **GRANTED.**

9 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
10 **DENIED.**

11 The District Court Executive is directed to file this Order,  
12 provide copies to counsel, enter judgment in favor of defendant,  
13 and **CLOSE** this file.

14 DATED this 2nd day of February, 2011.

15 s/ James P. Hutton

16 JAMES P. HUTTON

17 UNITED STATES MAGISTRATE JUDGE  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28